系所班組別:科技法律研究所碩士班 甲組(科技專業組)

考試科目(代碼):文獻評析(含中文文獻及英文文獻)(4002)

共\_\_14\_\_頁,第\_\_1\_\_頁 \*請在【答案卷】作答

一、請閱讀以下文章,並以英文回答問題:(30%)

(The Economist, October 18<sup>th</sup>, 2014, with certain modification)

#### The War on Ebola

In September1976 scientists in Antwerp received a Thermos out of Yambuku, in what was then Zaire, with two samples from a nun who was fatally ill. One of the vials had smashed, but after scooping the other out of a pool of icy water, blood and broken glass, they discovered that they were handling a deadly and unknown virus. To spare Yambuku from infamy, they named the infection after a local river, the Ebola.

The next 36 years saw about 20 Ebola epidemics. Each was in a village or small town in central Africa and subsided after claiming fewer than 300 lives. Today's crisis is of a different order. It has struck down three countries—Guinea, Liberia and Sierra Leone—with a combined population of over 20 million. Almost 4,500 deaths have been recorded: the actual total is much larger. The epidemic is still rampant, destroying communities as it goes. It has spread sporadically to other African countries and to Spain and America.

The World Health Organisation (WHO) fears up to 10,000 new victims a week by December, perhaps 70% of whom will die. Its chief calls the epidemic "the most severe acute public health emergency in modern times." Now that the world has woken up to the danger, the task is to stop the toll reaching hundreds of thousands, if not millions. That is feasible only with sustained international collaboration. And so far, collaboration is something the response has tragically lacked.

Like any epidemic, Ebola is best stopped early. It kills health workers by exposing them to patients who, by the end, exude up to ten litres of virus-laden fluids a day. The number of infections seems to be doubling every two to four weeks. As health-care workers fall ill and the infection grows exponentially, a society's defences against Ebola are rapidly overwhelmed.

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This time the response has been fatally slow. One reason is that an Ebola epidemic had never been seen in that part of Africa. The disease may also have been helped by urbanisation and development, which strengthen the transport links that shuttle virus from villages to the town and back into uninfected country. Perhaps it was only a matter of time before Ebola would find its way into a slum too chaotic and vast to cope.

Recrimination is for later. The effort now must go into defending against Ebola's spread. The disease poses only a slight risk in rich countries, because tracing, diagnosing and isolating scattered cases is within the scope of their health systems. Officials are minimising the threat by screening travellers, though apparently healthy people can be incubating Ebola.

But to quarantine an entire chunk of west Africa would be both wrong and futile. Borders would be permeable. People would flee and pay bribes. As the virus conquered west Africa unchecked, more untraceable emigrants would carry it inside their bodies. When the epidemic spread, would you then slam the door on Ivory Coast and Nigeria? Dhaka? Mumbai?

The way to make the world safe is vigilance outside west Africa and to drain the reservoir of infection within it. Because the disease kills fast and spreads only via direct contact with body fluids, patients infect an average of just 1.5-2.2 others. If you reduce that ratio, the epidemic will slow; if you can get it below one, it will subside.

Science can help. If instant-diagnosis kits work, health-care workers can isolate patients early on, when the disease is hard to tell from malaria or cholera. Eventually, new vaccines could offer protection for the general population—though they will not be ready for many months. Instead the first doses should be used to try to ensure that medical staff are safe, helping to eliminate today's grave shortage of people willing to put themselves forward as carers. Other ideas include new antiviral medicine. Serum from survivors is promising, too: more could be done to get it to patients. But different treatments need to be tested against each other in a systematic way to see which ones work and which will not.

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In the meantime, the world must strive to turn back Ebola the old-fashioned way. The WHO has set the goal: 70% of burials must be safe and 70% of cases isolated locally or in clinics, both within 60 days. It is a daunting task.

The plan will fail if people mistrust health advice. But fear and suspicion spread even faster than the virus. Some who try to teach people about the disease have been attacked.

Conspiracy theories are rife. Some try to avoid the stigma of Ebola, by pretending they have caught something else. There is a black market in death certificates, so that families can bury their members in local graves. The good news is that safer behaviour is spreading—in the way people greet each other, and in rapid burials that shun rituals of touching and kissing.

The plan will also fail without more treatment centres. Liberia has 620 beds but needs five times that number—and the demand is growing exponentially. By one reckoning, a 70-bed clinic costs \$1m a month to run and needs two to three staff for each patient. America, Britain and the World Bank have between them promised almost \$2 billion. Pledges are coming in fast. If more cash is needed, it will be found. Much harder is to get the treatment centres rapidly built, supplied and staffed.

Ebola infects everything. People keep away from fields and markets—so the price of cassava has more than doubled and there is a risk of hunger. Children are orphaned, businesses close, political and tribal resentments flare up. All that will only make Ebola harder to beat. It is a test for the people of west Africa. But it is also a test for a globalising world. The slums of Freetown are closer to the streets of London than they have ever been. Some, like Cuba and Médecins Sans Frontières, have risen to the occasion. Too many still have not.

- 1. What are the challenges posed by the Ebola crisis? (15%)
- 2. How can governments and international organizations work together to address such challenges? (15%)

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二、請閱讀以下文章,並以中文回答問題:(20%)

(Bloomberg View, March 30, 2015, with certain modification)

Free Speech Inc.

By Cass R. Sunstein

The most illuminating free-speech case of 2015 has nothing to do with political speech, or civil-rights protests, or hate speech, or any other issues we used to associate with the First Amendment. It has to do with an obscure provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act that directs the Securities and Exchange Commission to require companies to inform the public if their products use conflict minerals.

The case, brought by the National Association of Manufacturers, is the culmination of a stunningly successful corporate movement to transform the First Amendment into an all-purpose shield against even modest regulation. Let's give the movement a name: Free Speech Inc.

The conflict minerals controversy came to a head in 2012, when the SEC issued a regulation requiring companies to conduct a "reasonable country of origin inquiry" to see if their products use minerals that are sold to finance war and humanitarian catastrophe in covered nations — principally Congo. If they do, then companies must report those products, publicly, on an SEC website.

In 2014, the court of appeals ruled that this requirement was reasonable and consistent with Dodd-Frank. The only problem involved the First Amendment, the freedom of speech clause under the U.S. Constitution. The court noted that the government is usually free to require companies to disclose "purely factual and uncontroversial information," but insisted that this principle is limited to government efforts to protect consumers from deception.

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In the case of conflict minerals, the government's goal is to let consumers know whether the products they buy are helping to finance a war. To the court, that's unconstitutional, because "it requires an issuer to tell consumers that its products are ethically tainted, even if they only indirectly finance armed groups." (Is it a lot less bad to help finance war if you do it "only indirectly"?)

Because of an intervening decision that drew its ruling into question, the court of appeals has agreed to revisit the question this year. But Free Speech Inc. has been winning a lot of important cases. More than a decade ago, the U.S. Supreme Court struck down Massachusetts' attempt to regulate outdoor advertising of tobacco products within a thousand feet of public playgrounds or schools. More recently, a court of appeals invalidated a regulation from the Food and Drug Administration, responding to a direction from Congress, that would have required graphic warning labels on cigarette packages.

What's going on here? In 1975, no one could have imagined such rulings, or foreseen that the SEC's disclosure requirement for conflict minerals would have run into any constitutional difficulty.

The right to free speech, at its inception, was closely connected with the defining idea of government by We the People. Elaborating the principle, James Madison explained that self-government "depends on the knowledge of the comparative merits and demerits of the candidates for the public trust." In his view, "free communication among the people" is "the only effectual guardian of every other right."

From the founding period until late in the 20th century, the court never ruled that the First Amendment protects commercial advertising. Then suddenly, in 1976, it reversed course with a decision in a case brought by Virginia consumers who objected to a law that barred pharmacists from advertising prescription drug prices. Emphasizing that consumers have a keen interest "in the free flow of commercial information," the court ruled that the state could not forbid truthful, non-deceptive advertising.

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In dissent, Justice William Rehnquist objected to the "far reaching" implications of "a decision which elevates commercial intercourse between a seller hawking his wares and a buyer to the same plane as had been previously reserved for the free marketplace of ideas." If anything, Rehnquist understated the implications.

As my colleague John Coates, a professor of law at Harvard, has demonstrated, recent decades have seen a genuine revolution in free speech law. Far from being used to ensure the preconditions for self-government, the First Amendment is being regularly invoked as a barrier to fairly modest regulatory requirements. Ironically, those requirements are usually designed to ensure that consumers are informed.

Birthed by a consumers' rights decision in 1976, Free Speech Inc. has already been an astonishing success story. The conflict minerals controversy will provide crucial evidence about its future.

- 1. 請以 100 字內篇幅, 簡述本文作者提出之 Free Speech Inc. 概念。(10%)
- 2. 請另以200字內篇幅,摘要本文重點。(10%)

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#### 三、請閱讀以下敘述,以中文回答問題:(50%)

我國目前對集會遊行採取許可制,即法律要求舉行集會遊行前,原則上須向主管機關申請並經其許可。但一直以來,有不少民間的聲音要求改採報備制,即希望集會遊行僅須向主管機關報備,毋待主管機關之同意即可舉行。司法院大法官曾在釋字第 445、718 等號解釋中面對集會遊行許可制是否合憲的問題,其結論並不否定許可制的合憲性。例如在釋字第 718 號解釋理由書中提到:

室外集會、遊行需要利用場所、道路等諸多社會資源,本質上即易對社會原有運作秩序產生影響,且不排除會引起相異立場者之反制舉措而激發衝突,主管機關為兼顧集會自由保障與社會秩序維持(集會遊行法第一條參照),應預為綢繆,故須由集會、遊行舉行者本於信賴、合作與溝通之立場適時提供主管機關必要資訊,俾供瞭解事件性質,盱衡社會整體狀況,就集會、遊行利用公共場所或路面之時間、地點與進行方式為妥善之規劃,並就執法相關人力物力妥為配置,以協助集會、遊行得順利舉行,並使社會秩序受到影響降到最低程度。在此範圍內,立法者有形成自由,得採行事前許可或報備程序,使主管機關能取得執法必要資訊,並妥為因應。此所以集會遊行法第八條第一項規定,室外之集會、遊行,原則上應向主管機關申請許可,為本院釋字第四四五號解釋所肯認。

蘇永欽大法官於釋字第718號解釋所提出之協同意見書中,為肯認許可制合憲的立場提出進一步的論述:

聲請人認為基於我國憲法對集會自由的保障,國家得管制一般集會的上限只能設定於報備制,也就是事前的通知,以完成通知為集會合法的要件,而不能放寬到許可制,也就是事前的許可,以主管機關作成許可處分為集會合法的要件。即使解釋後未發生重大情事變更,但如能證立第四四五號在比例原則的操作上確實低估了憲法保障集會自由內蘊的價值,當然仍可構成「變更」解釋的理由,本院第四三九號解釋可參。本件解釋多數意見不贊同第四四五號解釋在這部分的權衡有何失誤,因此最後只作了補充而非變更。其主要的理由,除了該號解釋已對集遊法許可管制規定的實質意義作了深入分析,顯示其原則許可的本質,而且在

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列舉得不許可的情形後(集遊法第十一條),又有明文規定要求為許可管制的機關應符合比例原則(第二十六條),因此對於不許可或附有附款的許可,依行政程序法都必須附記理由,而得受司法的審查,和形式上採報備制,實際上保留主管機關基於報備資料為禁止、課予限制或負擔等處分的管制,如德國的集會遊行法,實質的差異只剩下主管機關保留審查作業時間的長短。若採許可制時明定許可處分期限,採報備制時保留報備資訊不足而「不予備查」的權限時,兩者間幾乎全無差異。更重要的是,該號解釋進一步明確的把許可制主管機關對於准駁納入裁量的範圍限縮於未涉及集會、遊行之目的或內容的時間、地點及方式等(「其中有關時間、地點及方式等未涉及集會、遊行之目的或內容之事項,為維持社會秩序及增進公共利益所必要,屬立法自由形成之範圍,於表現自由之訴求不致有所侵害,與憲法保障集會自由之意旨尚無牴觸。」),比起許多採報備制的國家,得以無關時間、地點及方式因素,僅因議題本身可能對社會安定有重大影響,即可加以禁止的立法,在管制的程度上實際上更為寬鬆。如果這些細節都未深入評價,即以第四四五號解釋未認定許可管制違憲,有違比例原則,論證未免過於粗糙。

會造成實質放寬的,必須是認為憲法保障集會自由的意旨,是連時間、地點、方式等無關言論內容的事前許可管制都無法容忍,憲法可以容忍的只到報備為止,也就是現行許可管制內含的,讓有時間、地點、方式選擇權的集會遊行發起人負有提供資訊「並」與主管機關就此協商的義務(此即社會管制領域應採公私合作原則的重要範例),一概免除。主管機關只能就報備取得的時間、地點與方式等資訊單方面去作各種保護集會遊行及降低其對社會秩序影響的規劃。邏輯上足以支持這樣主張的法理,必須是支持作這些公共空間其他利用方式的價值都認對的低於公共論壇的利用方式,因此在交通管制機關來不及作任何安排的情況下,仍只能讓許多為養家活口而奔波於途的民眾被迫在上下班時間駐足街頭看完所有遊行者展示的訴求—還有什麼時間和地點能讓遊行者的訴求取得更高的傳播率?或者讓遊行者在不知情的狀況下經過敵對信仰者群聚地帶而受到傷害。一定要說憲法內含這樣的價值權衡,或民主政治非如此無法落實,恐怕也需要更多的論證。至少在國際人權公約,或民主國家集會遊行的界線而言,世界人權宣言過於簡略可以不看,公政公約和歐洲人權宣言都很清楚的劃出了兩道界線,

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其一是法律保留(就此二者在用語上有細微的出入,此處不贅),其二則是管制 者可以納入權衡的法益只限於國家或公共安全,衛生、善良風俗以及第三人的自 由權利。毫無疑問集會自由背後的言論自由與民主政治考量必須受到特別嚴肅的 對待,但若說連中立於言論內容的外在秩序因素,也要讓集會遊行者的選擇有絕 對優越性,恐怕是怎樣都推導不出來的。以歐洲人權法院西元一九九五年四月六 日在 Milan Rai, Gill Allmond & "Negotiate Now"v. UK 一案的判決為例,法院認 定特拉法廣場的管理單位不出借給愛爾蘭和平倡議組織作定點集會,是為了避免 北愛爾蘭的議題正熾之際,在此一著名廣場舉行千人集會的確存在被偏激者利用 而進行恐怖行動的危險,因此政府作這樣的管理符合比例原則。各國憲法關於集 會自由的保障,不少是從室內和室外的二分出發,而對前者嚴格排除許可管制, 對於後者則多如前二公約所揭兩原則,包括德國基本法第八條、西班牙憲法第二 十一條、希臘憲法第十一條、荷蘭憲法第九條、比利時憲法第二十六條、丹麥憲 法第七十九條等,只有義大利憲法第十七條第三項明文規定公共場所的集會應採 報備而得禁止的管制原則。在新興民主國家普遍仍採許可管制的情形,聯合國和 歐安會確實都曾提出有關集會自由保障的文件(聯合國人權委員會特別報告員編 號 A/68/299 報告:Rights to Freedom of Peaceful Assembly and of Association;歐 安會/民主制度及人權署(OSCE/ODIHR)關於集會自由的專家意見:Guidelines on Freedom of Peaceful Assembly),一般性的對許可管制加以警告,「鼓勵」各國 儘可能採報備制,但也都強調,許可管制應以時間、地點及方式的管制為度。這 些原則性的、二分法的單純立場宣示,不能忽略其文本脈絡,是以何種「許可制」 為檢討對象。相對於本院在第四四五號解釋經過言詞辯論而有深入比較所做的審 查,把重點放在集會自由實質上受到限制的程度,而非形式的許可或報備選項, 其細緻度實已不可相提並論。

簡言之,第四四五號解釋對於現行集遊法的許可管制所設限制,與國際人權公約與絕大多數民主國家的管制尺度相較,在集會自由的保障上都毫不遜色,為凸顯該號解釋已揭示的許可管制精神與界線,本件解釋在理由書中也就此再作了一番闡釋:「主管機關為兼顧集會自由保障與社會秩序維持(集會遊行法第一條參照),應預為綢繆,故須由集會、遊行舉行者本於信賴、合作與溝通之立場適時提供主管機關必要資訊,俾供瞭解事件性質,盱衡社會整體狀況,就集會、遊行利用公共場所或路面之時間、地點與進行方式為妥善之規劃,並就執法相關人

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力物力妥為配置,以協助集會、遊行得順利舉行,並使社會秩序受到影響降到最低程度。在此範圍內,立法者有形成自由,得採行事前許可或報備程序,使主管機關能取得執法必要資訊,並妥為因應。」故未來是否改採報備而附禁止保留的報備制,恐怕真的只剩「社會觀感」的差異,也就是要不要對於保障人權提供更多口惠服務 (lip service) 的問題。但這些正好是政治部門在決策時有必要考慮的因素,本院行使違憲審查的職權,當然不能連這最基本的角色定位都無法掌握。

相對地,有數位大法官對許可制提出批判,例如李震山大法官於同號解釋所提出(並有葉百修大法官、陳春生大法官、陳碧玉大法官加入)之不同意見書中指出:

一、「準則許可制」幾已成為捍衛許可制的「反動修辭」 (rhetoric of reaction)

本院釋字第四四五號解釋稱:「集會遊行法第十一條規定申請室外集會、遊行,除有同條所列情形之一者外,應予許可。從而申請集會、遊行,苟無同條所列各款情形,主管機關不得不予許可,是為準則主義之許可制。」該見解應係採自主管機關於言詞辯論庭的主張,包括行政院認為:「各國立法例對於集會、遊行之管理方式有採報備制者,有採許可制者,集會遊行法所採,雖為許可制,其性質非屬特許而近準則主義」;內政部及內政部警政署則主張:「集會遊行法第八條、第十一條所採實係準則許可制,其與報備制之差別僅在行政程序有異,兩者在本質上並無不同。」該種說法之外,再輔以官方不予許可比率甚低的統計數字,大大擴獲贊成事前抑制者的芳心。因為「準則許可制」既然與報備制相去不遠,又可有備無患應不時之需,一舉數得,何樂而不為?其實,此種障眼法易生魚目混珠、馮京當馬涼的效果,有諸多可議之處,借此機會予以辨明。

首先,從制度面言,將一般民事、財經、行政事件上的事前許可,與和政治性言論或表現自由有關集會遊行事件的事前許可相比,本質上就有點不倫不類,若再含混地套用,其荒謬結果,不難想見。因為「準則主義」的概念與用語,並不會影響「許可制」事前抑制的「本質」,也不會因集遊法第十一條中出現「應予許可」一詞,即推斷集遊法所採者形同報備制。「準則許可」,只是為賦予執法機關更寬廣的裁量空間鋪路,從而隱藏恣意的危機,就如同披著羊皮的狼,總有露出猙獰臉孔的時候,只是時機的問題。即當集會遊行之內容、目的、訴求嚴重

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挑戰當政者意識型態或政治利益的「紅線」時,平時備而不用的許可制,一夕間成為可以揮舞的大刀,而殺雞可用的牛刀不只一把。民間對於二〇〇八年十一月「陳雲林事件」就留下深刻印象。「準則許可制」猶如一泓平靜池水中,鱷魚潛伺。維持集會自由的制度,搖身一變成為箝制集會自由的制度,隱藏著「制度性」的危機,成為孕育「人治」的沃壤,是為法治主義所不許,違憲審查者似乎對此共同生活經驗毫無警覺。

其次,從執行面言,依行政裁量理論,集遊法第十一條共六款規定,範圍鋪天蓋地,實際上「應予許可」之空間已遭壓縮至極小,反之,不許可空間極大,屬典型「裁量萎縮至零」 (Ermessenschrumpfung auf Null) 。且該條之執行在「收與放」或「鬆與緊」之裁量,常繫於主管機關一念之間,諸多遇強則弱,遇弱則強的實例,例如:將主管機關或法院,針對眾所矚目「紅衫軍事件」與本件解釋原因案件之一的「少數學生抗議高學費事件」之處理對比,即有兩套標準、執法不公之訾議,凸顯準則許可制係「留一手」,使「依法行政」有高度不可預測性。如果換個執政或執法者,原來的許可亦可能轉變成不許可,無怪乎集遊法常被評價為不顧多元價值有違社會正義的惡法。

其三,從統計數字的迷思面言,由於許可制精神下的法律規定與制度設計,本質上就與使人民願意且在毫無恐懼的情況下行使集會自由,有先天上的矛盾,因不信任公權力而不申請、因懼怕遭刁難不去申請、因確信不會被許可而逕行舉行或自信和平集會無須申請等,就成為許可制對「集會內在自由」制約的必然結果與代價。而那些未申請且在許可制統計數上極具意義的案件,是官方統計數據上所無法呈現的「黑數」,管制愈嚴格,「黑數」比率愈高。反之,在諸多被許可的集會、遊行案件中,究有多少是主管機關觀察與論風向球或接受政治指導,並非制度本身開放性下的合義務性裁量,而是以「行政自我約束」為由自我開脫的結果,官方之統計數字亦無法正確反映。退一步言,既然強烈標榜集會遊行之申請不予許可的比率極低,何不逕採無違憲疑慮的「報備制」,豈不皆大歡喜?很顯然地,緊抱以「準則許可」「為皮」,許可制「為骨」而有違憲疑慮的現行制度不放,表示對以開放、對等為基礎的報備制相當恐懼與排斥,足見兩者本質上必有相當差距,否則無須一再拒斥合乎憲法意旨的報備制。

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其四,從警察實務面言,現行「準則許可制」與「報備制」並非完全一致。依學者的研究稱:「可以從警察將那些未經許可之集會遊行者的標語或旗、牌,強行取走的案例看出,警察為何可以將未經申請許可者的標語及旗、牌強制取走,待事後再歸還?原因應該是在『該集會遊行未經許可,故不准有訴求出現』。倘若是報備制,則警察即無理由取走訴求標語或旗、牌等,即使集會遊行者違法,亦不能取走其訴求物,這才是所謂原則上許可言論表達的自由,只有例外將出現騷亂之虞時,才會被制止的報備制,換句話說其所謂原則與例外,其實是有先後次序,並非在同一個層面。」淺白的舉例,道出了問題的底蘊。

最後,當主管機關沈醉於「準則許可制」並將之玩弄於股掌之間而遭受選擇性執法或執法不公的嚴厲批評時,與其譴責或歸責於不幸成為政治工具的執法代罪羔羊,不如從憲法檢討導致人治淩駕法治的集會遊行許可制,方能協助執法機關走出執法中立的困境,挽回其職業尊嚴。綜上,「準則許可制」儼然成為捍衛許可制而渗透力與渲染力十足的「反動修辭」,對此種悖論不能不慎思而明辨之。

#### 二、報備制與許可制在憲法上的民主意涵大不相同

從限制自由權利制度光譜以觀,由寬至嚴可粗分為事後追究之追懲制、與事前抑制的預防制兩種。若以集會遊行舉辦有關之申報事宜為例,追懲制是指事前不必申請亦無須報備,但活動中有違法情形,得為下令、禁止、解散或懲罰,此制大都僅適用於室內集會或緊急性與偶發性集會。預防制下,集會遊行之發起人則須事先告知主管機關活動之梗概,以便其踐行提供適當集會場所、採取有效保護集會之安全措施的「國家保護義務」。依預防制規範強度與密度又可分許可制與報備制,前者要求室外集會遊行者,原則上應須履行事先經同意或許可之義務,係將集會遊行之行為列屬一般禁止之行為,由主管機關以許可處分為解除禁止。至於報備制,又稱為申報制或登記制,須報備之事項原屬得自由行使而不受禁止之範圍,之所以仍須報備,主要目的是事先讓主管機關知悉而有所準備,除非有明顯事實足認為對公共安全、社會秩序有顯然急迫危害之不和平集會遊行,方有保留預防性禁止(Präventivverbot)之可能性。對同屬預防制的許可制與報備制,須再從以下憲法的民主意義去體認,否則只能停滯在「兩者並無太大差異」的圈套中,也就只能順水推舟地以尊重立法裁量收場。

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其一,許可制係「原則禁止,例外同意」(Verbot mit Erlaubnisvorbehalt),也就是附許可保留之禁止,表示集會自由須經政府的同意,並非人民本就應享有的「基本」權利。反之,報備制係「原則同意,例外禁止」 (Erlaubnis mit Verbotsvorbehalt),或附禁止保留的許可 (Anmeldung mit Verbotsvorbehalt,Verbot mit Anzeigvorbehalt),表示集會自由本屬於人民,報備只是便於主管機關踐行保護義務。依「例外之解釋應從嚴」之法理,將展現出雲泥有別的迥異風貌。

其次,在許可制支配下的集遊法規範或執行,主管機關與人民間是上下從屬關係,須上命下從,易將人民視為客體、工具,甚至予以敵視或歧視,不會重視集體人格型塑問題。報備制下,主管機關與人民間處於對等溝通合作關係,將人民視為目的,重視人民自治自決及其尊嚴,人民自得展現作為國家主人應有的格局,民主意義下的主僕定位,天差地別。

其三,在許可制支配下的規範面,不必太講求憲法嚴格意義的法律保留、法律明確性、正當法律程序、比例原則或平等原則。反之,報備制的規範,除對等、公開、透明外,以上憲法原則皆是最低門檻要求。縱然許可制與報備制規範採相近的要件,在精神上許可制就引領著行政與司法人員,在適用法律時偏重於社會秩序,忽略集會自由權之保障。況在許可制下,很難釐清請願、宗教、民俗等聚眾活動與集會遊行間之模糊關係,反而製造緊張對立關係,並因不易執行而踐踏集遊法之尊嚴,報備制則可緩解以上關係。

其四,集遊法若採報備制,仍須課予籌辦集會遊行者提供相當資訊之義務,係預防性質而非追懲制。就「蒐集必要資訊」言,許可制與報備制有共同需求,報備制與正當法律程序之關係展現在合作誠命 (Kooperationsgebot) 。通知當事人陳述意見、請求當事人協力、提供資訊,並據此作為行政機關與人民合作溝通之基礎,甚至舉行公聽引進專家意見等。反之,許可制下主管機關得片面要求人民提供資訊,未必釋出本身所掌有資訊與決策過程,在資訊不對稱狀況下,極易造成黑箱作業且因不信賴而形成緊張關係。

其五,在法律效果上,未經許可之室外集會遊行即屬違法,制裁處分附隨而至。至於未經報備而舉行的集會遊行,包括緊急性、偶發性,若屬和平集會,雖

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有可能違反路權、場地使用、禁制區等規定,或發生少數零星暴力之情形,並非當然附隨解散之強制,尚須視集會遊行中發生影響公共安全與秩序情節分別依比例原則,審酌其是否仍在保障範圍之內。德國行政法學者 Maurer 教授之描敘頗為傳神:「應報備之事,未遭禁止,則為合法。應許可之事,未經許可,則屬非法。」因違反報備義務的相關制裁,原則上不會重於違反許可義務的制裁。

其六,在法庭審判過程中,許可制下,通常側重由公權力要求集會遊行者,證明其行為是正當;在報備制下,則是人民要求公權力證明其干預集會自由的正當理由。除主管機關與被告問舉證責任分配不同外,不同的制度也會影響法官就集遊法第二十六條有關比例原則之衡量。如今,集遊法許可制的合憲性再次由本件解釋予以「加持」,相信對法官審判心理上,應會有深遠影響。

綜上,報備制相較於許可制,就行政程序之簡繁、法律效果之寬嚴、行政處分限制與負擔附款之添加、人民與政府合作溝通之對等性,以及對人民舉行集會、遊行內在自由之限制等,對集會自由之侵害皆屬較小,其顯現在支配司法審判與行政執法之實質意義非常可觀。縱然,集遊法許可制與報備制規範要件雷同,然因執法心態不同,執法結果亦會大異其趣。因此,空泛主張報備制與許可制「本質上並無不同」者,有粗疏率斷之嫌。

請無須深究現行法律規定與概念的細節,以閱讀上述內容及自己的想法為基礎, 回答下列問題:

- 1. 支持許可制的主要理由為何?(15分)
- 2. 反對許可制的主要理由為何?(15分)
- 3. 你認為我國目前採行的許可制,與報備制有無本質上的不同?(20分)